Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL RIFLE ASSOCIATION
OF AMERICA
Petitioner,

v.

HANDGUN CONTROL FEDERATION OF OHIO
AND SUSAN AXELROD
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the unauthorized photocopying of a copyrighted work for a noncommercial use is a "fair use" within the meaning of 17 U.S.C. § 107, as recently interpreted by this Court in Campbell v. Acuff-Rose Music, Inc., ___ U.S. ____, 114 S.Ct. 1164 (1994), where the user presented no evidence of the effect of the use on the potential market for, or value of, the work?

Whether the unauthorized photocopying of a copyrighted work is a "fair use" within the meaning of 17 U.S.C. § 107 if the user portrays the work as his own?

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OPINION BELOW

The opinion of the Court of Appeals (Appendix) is reported at 15 F.3d 559 (6th Cir. 1994).

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1994. On April 29, 1994, Justice Stevens

extended until June 1, 1994, the time in which to file this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

17 U.S.C. § 107.

Limitations on exclusive rights: Fair use.

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

STATEMENT OF THE CASE

On May 5 and June 7, 1989, the National Rifle Association of America (hereinafter "NRA")[1] sent short letters (two pages in May and one page in June) to its members urging opposition to two "gun control" bills pending in the Ohio legislature. Attached to each newsletter was a three-page listing of Ohio state legislators in a unique format devised by NRA utilizing data derived from a number of sources. One page listed the thirty-three members of the Ohio Senate by their district numbers in ascending numerical order, their home cities, and their phone numbers both in their districts and in Columbus. An asterisk was placed before each of the eight members of the Senate Judiciary Committee. The other two pages contained the same information for a list of the ninety-nine members of the Ohio House of Representatives, with asterisks placed before the nineteen members of the House Judiciary and Criminal Justice Committee. Below the list of representatives was one paragraph of text, reading:

> Those 19 State Representatives marked with an asterisk (*) serve on the House Judiciary and Criminal Justice Committee to which H.B. 372/H.B. 483 has been referred. It is extremely

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[1]The NRA is a New York-based non-profit corporation that lobbies officials and educates its members and the public in support of the ownership of firearms by law-abiding citizens.

> important, especially if you are one of their constituents, to contact their office opposing H.B. 372/H.B. 483. Address letters to your State Representative as follows: The Honorable ___; Ohio House of Representatives; State House; Columbus, Ohio 43266-0603.

A similar paragraph on the Senate page explained the asterisks by the senators and urged members to contact them.

On June 14, 1989, the Handgun Control Federation of Ohio and Susan Axelrod (hereinafter "HCF")[2] mailed a ten-page newsletter to about 200 of its members, in support of the same House bill the NRA opposed. The newsletter began with a page briefly explaining the pending bill and urging the writing of letters to several major Ohio newspapers, whose addresses were provided. Pages eight and nine of the newsletter were NRA's uniquely formatted list of Ohio representatives, which HCF admits was photocopied from one of the NRA mailings, which HCF received. The block of text at the bottom of the list was included in the copying, except that a few words, including the word "opposed," were blocked out.

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[2]HCF is a non-profit organization and engages in activities supporting legislation limiting the right of law-abiding citizens to acquire or possess firearms, in opposition to the NRA. Susan Axelrod was, at all relevant times, the executive director of HCF.

On July 27, 1989, the NRA filed for and received copyright protection for its newsletters.[3] The NRA filed the complaint in this action on May 2, 1990, alleging that HCF copied the NRA's compilation of information concerning the members of the Ohio legislature and published it in its newsletter in violation of the NRA's exclusive copyright under the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq.

On September 2, 1992, the district court granted summary judgment to HCF. 15 F.3d at 560.[4] The court held that the NRA's list of the Ohio representatives could not be copyrighted. Moreover, even if the material was copyrightable, the court held, the defense of "fair use" would bar any damage recovery.

The NRA appealed to the U.S. Court of Appeals for the Sixth Circuit, which affirmed, solely on the ground that the use of the copyrighted material was a "fair use" within the meaning of 17 U.S.C. § 107. The court of appeals did not address the question of copyrightablity.[5]

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[3]17 U.S.C. § 412 allows damages for copyright infringement, so long as the registration for the copyright occurs within three months of the publication of a work. NRA timely filed for copyright protection within three months.

[4]The district court subsequently "dismissed the case." 15 F.3d at 561.

[5]"[W]e need not reach the HCF's argument that the NRA document contained so little originality that it could not be

ARGUMENT

I.
The Sixth Circuit misapplied this Court's interpretation of the fourth factor of the "fair use" analysis of 17 U.S.C. § 107

As it did previously in Campbell v. Acuff-Rose Music, Inc., 972 F.2d 1429 (6th Cir. 1992), rev'd, ___ U.S. ___, 114 S.Ct. 1164 (1994), the Sixth Circuit in the instant case erroneously applied this Court's interpretation, in Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774 (1984), of the fourth factor of the "fair use" analysis in determining that HCF's use of NRA's copyrighted list was a "fair use" within the meaning of 17 U.S.C. § 107. While the Sixth Circuit's consistency may be laudatory, its error is not.

The Sixth Circuit's decision in the instant case was issued February 1, 1994, just five weeks before this Court's decision in Campbell, in which this Court reversed the judgment of the Sixth Circuit, holding that the Sixth Circuit's "presumption about the effect of commercial use" was "error." 114 S.Ct. at 1177. In the instant case, the same error was duplicated by the Sixth Circuit since it acted without the benefit of this Court's decision in Campbell.

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copyrighted in the first place." 15 F.3d at 562.

In the instant case, the Sixth Circuit viewed Sony as holding that

> whether an activity is commercial sets a presumption regarding which way the fourth factor points in a fair use analysis . . . . (emphasis added) 15 F.3d at 561.

Consequently, the Sixth Circuit reasoned, a court must only try "to see how the use could harm the NRA's market." 15 F.3d at 562. And, not being able to imagine how that could be seen -- indeed, conjuring up a fanciful argument that NRA's "market" would actually be benefitted by HCF's pirating of NRA's materials[6] -- the Sixth Circuit let the presumption decide the question of which way the forth factor "point[ed]."

Both in finding a presumption in § 107 (as construed by Sony) which could point either way and in overlooking the need for HCF to offer evidence to support a "fair use" defense, the Sixth Circuit -- as it did in Campbell -- misapplied § 107.

A) In reversing the Sixth Circuit's decision in Campbell, this Court, in articulating the "error," 114 S.Ct. at 1177, committed by the Sixth Circuit, described how its earlier decision Sony should have been read by the

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[6]"There is presumably more need for the NRA's list if their opponents' activities become more vigorous." 15 F.3d at 562.

Sixth Circuit:

> No "presumption" or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. Sony's discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of Sony itself (home copying of television programming). (Emphasis added). 114 S.Ct. at 1177.

As with Campbell, the instant case does not involve "mere duplication for commercial purposes," as the Sixth Circuit itself recognized: "HCF's use of the NRA legislator list was noncommercial." 15 F.3d at 562. Thus, in view of this Court's holding in Campbell, there was no basis for any presumption in analyzing the fourth factor, as the Sixth Circuit concluded in holding that "whether an activity is commercial sets a presumption regarding which way the fourth factor points . . . ." 15 F.3d at 561. Rather, the court of appeals should have, according to Campbell, examined the record for evidence supporting "fair use."

B) There being no presumption, either in favor of the copyright holder or the user in a noncommercial use of a copyrighted work, the user must "carry[] the burden of demonstrating fair use," Campbell, 114 S.Ct. at 1177,

given that "fair use is an affirmative defense . . . . " Id.

In the instant case, by contrast, the Sixth Circuit, consistent with its earlier decision in Campbell, did not recognize "fair use" as an affirmative defense.[7] Moreover, it did not look for evidence in the record supporting "fair use" but rather, having found a presumption in the law, did not even see the need to look for such evidence.[8] Of course, the Sixth Circuit would have found no such evidence since, as with the defendant in Campbell, HCF "failed to address the effect on the market," 114 S.Ct. at 1177, of its use of NRA's copyrighted work.[9] Indeed, the instant case is devoid of any record evidence concerning the effect on NRA's market or on the value of the work and accordingly suffers from the same "silent record on an important

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[7]The Sixth Circuit thus seemingly accepted respondents' argument that the plaintiff had the burden of proving that the defendants' use was harmful.

[8]As noted, supra, the Sixth Circuit not only abjured the need to base its conclusion on record evidence, it conjured up, out of thin air, a bizarre argument that NRA actually benefitted by the piracy of its work. In fact, the evidence would show that NRA was harmed since the value of its list was diminished by HCF's use of it due to the fact that HCF could then more effectively counter NRA's legislative efforts.

[9]The Sixth Circuit also did not address the alternative standard established by the fourth factor: "the effect of the use upon the . . . value of the copyrighted work." 17 U.S.C. § 107.

factor bearing on fair use." 114 S.Ct. at 1179.[10] Because "no such evidentiary presumption is available to address . . . the fourth [factor], market harm," 114 S.Ct. at 1179, as with Campbell, this case, at a minimum, needs to be remanded to allow the "evidentiary hole [to] be plugged . . . ." 114 S.Ct. at 1179.[11]

II.

The Sixth Circuit's decision conflicts with decisions of the Second and Fifth Circuits regarding application of the "fair use" defense under 17 U.S.C. § 107.

A) In Weissman v. Freeman, 868 F.2d 1313 (2nd Cir. 1989), in reviewing application of the "fair use" doctrine, the Second Circuit noted that

> it cannot be ignored that [the copier] not only neglected to credit [the author] for her authorship

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[10]The issue of what is NRA's "market" was, of course, not addressed by the district court or the court of appeals, due to their erroneous understanding of the fourth factor. This question need not be resolved by this Court since it is part and parcel of the evidence that respondents should have offered in the district court.

[11]While the Sixth Circuit did not expressly analyze the first factor, it stated that the HCF newsletter, taken as whole, "served an educational purpose. . . ." 15 F.3d at 562. In holding, as a consequence, that HCF's use was thus "fair," the Sixth Circuit again acted contrary to this Court's decision in Campbell, which held that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement. . . ." 114 S.Ct. at 1174.

> of P-1, but actually attempted to pass off the work as his own, substituting his name as author in place of hers. Adding insult to this injury, he then distributed copies of her work, but modified the title slightly to one of his own devising. . . . [The copier's] conduct severely undermines his right to claim the equitable defense of fair use. 868 F. 2d at 1324.

Importantly, the Second Circuit went on to observe that it had found no case that sustained the "fair use" defense "under circumstances where copying involved total deletion of the original author's name and substitution of the copier's." Id.

In Triangle Publications, Inc. v. Knight-Ridder Newspaper, Inc. , 626 F.2d 1171 (5th Cir. 1980), the Fifth Circuit approved application of the "fair use" defense, but only after noting that "there was no attempt to palm off Triangle's product as that of the Herald's." (emphasis added). 626 F.2d at 1176. Similarly, in the case that Triangle Publications, Inc. cited for comparison, Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc., 105 F. Supp. 325 (S.D.N.Y. 1952), the court rejected the "fair use" defense even though the defendants "were not attempting to advance [the copyrighted material] as the product of their own genius and effort . . . ." 105 F. Supp. at 333.

Contrary to these decisions -- that advancing

copyrighted material as the reproducer's own material should, without more, ensure rejection of the "fair use" defense -- the Sixth Circuit in the instant case approved precisely what the Second and Fifth Circuits have condemned; it found a "fair use" even though HCF had "passed off" or "palmed off" NRA's list (and most of the accompanying text) as the product as their own efforts. This is a conflict which this Court should resolve.

B) An examination of the application of the second factor of the "fair use" analysis by the Second Circuit in Weissman, supra, also points up a conflict with the Sixth Circuit.

The second factor concerns the nature of the work. While the work as issue in the instant case was "almost entirely factual," 15 F.3d at 562, this does not insulate an unauthorized use from a copyright action under the rubric of the "fair use" defense. Just as protection of the scientific work in Weissman, supra, "may not be directly related to immediate financial gain" but provides "an incentive to continue research," 868 F.2d at 1325, copyright protection of NRA's list and text enable NRA to succeed in the legislative arena and thus to attract greater support, including financial, from its members and the general public. The Sixth Circuit has thus taken a position in conflict with the Second Circuit which this Court should resolve.

CONCLUSION

This Court should grant this petition to review the judgment of the Sixth Circuit in view of the Sixth Circuit's conflict with this Court's decision in Campbell and with decisions of the Second and Fifth Circuits. Alternatively, this Court should grant this petition, vacate the judgment of the Sixth Circuit, and remand for further consideration in light of this Court's decision in Campbell.[12]

Dated: May 1994

Respectfully submitted,

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[12]This Court has followed this course on many occasions in circumstances similar to the instant case. See, e.g., United States v. Sharpe, 457 U.S. 1127 (1982), John Nuveen & Co., Inc. v. Sanders, 425 U.S. 929 (1976), and Wallace v. House, 425 U.S. 947 (1976).

APPENDIX

NO. 92-4076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Plaintiff-Appellant,

v

ON APPEAL from the United States District Court for the Northern District of Ohio

HANDGUN CONTROL FEDERATION OF OHIO, *et al.*,
Defendants-Appellees.

Decided and Filed February 1, 1994

Before: MERRITT, Chief Judge; JONES, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

NATHANIEL R. JONES, Circuit Judge. The National Rifle Association of America ("NRA") appeals from the summary judgment that the district court granted for the Handgun Control Federation of Ohio ("HCF") in this copyright infringement action. The district court ruled that the NRA could not copyright the three-page list of Ohio legislators at issue here. We affirm, holding that HCF has made "fair use" of the list under the copyright statutes and therefore cannot be held liable.

APPENDIX - 2

I.

The NRA is a New York-based non-profit corporation that lobbies officials and educates the public in support of the ownership of firearms. HCF is also a non-profit organization and engages in similar activities, but toward a goal opposing that of the NRA.

On May 5 and June 7, 1989, the NRA sent short letters (two pages in May and one page in June) to its members urging opposition to two gun control bills pending before the Ohio legislature that provided for the ban of certain assault rifles and for waiting periods before gun purchases. Attached to each newsletter was a three-page listing of Ohio state legislators. One page lists the thirty-three members of the Ohio Senate along with their district numbers, their home cities, and their phone numbers both in their districts and in Columbus. An asterisk was placed before each of the eight members of the Senate Judiciary Committee. The other two pages contain the same information for a list of the ninety-nine members of the Ohio House of Representatives, with asterisks placed before the nineteen members of the House Judiciary and Criminal Justice Committee. Below the list of representatives was one paragraph of text, reading:

> Those 19 State Representatives marked with an asterisk (*) serve on the House Judiciary and Criminal Justice Committee to which H.B. 372/H.B. 483 has been referred. It is extremely important, especially if you are one of their constituents, to contact their office opposing H.B. 372/H.B. 483. Address letters to your State Representative as follows: The

Honorable ___; Ohio House of Representatives;
State House; Columbus, Ohio 43266-0603.

J.A. at 280. A similar paragraph on the senate page explained the asterisks by the senators and urged members to contact them.

On June 14, 1989, HCF mailed a ten-page newsletter to about 200 of its members, attempting to arouse support for the same House bill the NRA opposed. The newsletter began with a page briefly explaining the pending bill and urging the writing of letters to several major Ohio newspapers, whose addresses were provided. Seven other pages provided detailed information about types of guns, the effect of gun control legislation, and other states' related gun laws. Pages eight and nine of the newsletter contain a two-page list of Ohio representatives, which HCF admits was photocopied from one of the NRA mailings, which HCF received. The block of text at the bottom of the list was copied, except that a few words, including the word "opposed," were blocked out.

On July 27, 1989, the NRA filed for and received copyright protection for their earlier newsletters.[1] The NRA filed the complaint in this action on May 2, 1990, alleging that HCF copied the NRA's compilation of information concerning the members of the Ohio legislature and published it in its newsletter in violation of the NRA's exclusive copyright under the Copyright Act of 1976, 17 U.S.C. §§ 101-810.

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[1]We note that 17 U.S.C. §412 allows damages to be received for copyright infringement, so long as the registration for the copyright occurs within three months of the publication of a work. Because the NRA registered within this period, it is not blocked from receiving damages by the fact that it did not file for the copyright until after HCF sent out its newsletter

On September 2, 1992, the district court granted summary judgment to the defendant. The court held that the NRA's list of the Ohio representatives could not be copyrighted because the selection and arrangement of the information was "mechanical and routine." J.A. at 16. Even if the material was copyrightable, the court held, the defense of "fair use" would bar any damage recovery. *Id.* Therefore, the court saw no reason to go to trial and dismissed the case. The NRA now appeals.

We review a grant of summary judgment *de novo*. *Rector* v. *General Motors Corp.*, 963 F.2d 144, 146 (6th Cir. 1992). The question on review of a summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 251-52 (1986). Inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

II.

Copyrights provide an incentive for the creation of works by protecting the owner's use of his or her intellectual creation, allowing creators to reap the material rewards of their efforts. However, because not every use of a work undermines this underlying rational of copyright law, and because some uses of copyrighted works are desirable for policy reasons, the courts have long held that many uses of a copyrighted work do not infringe upon the copyright. Codifying these longstanding

"fair use" principles, Congress in the 1976 Copyright Act laid out 17 U.S.C. §107, which reads:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four factors enumerated are especially relevant to the determination of whether fair use occurred, but they are not meant to exhaust the possible considerations. *Harper & Row Publishers* v. *Nation Enter.*, 471 U.S. 539, 560 (1985). Likewise, the purposes listed in the preamble are illustrations of the sorts of uses likely to qualify as fair uses rather than an exclusive list. *Pacific and Southern Co.* v. *Duncan*, 744 F.2d

1490, 1494-95 (11th Cir. 1984), *cert denied*, 471 U.S. 1004 (1985).

We have no hesitation in finding a fair use here, for all the factors point in that direction. Though not conclusive, the fourth factor -- dealing with effect on market share -- is "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. This factor is generally demonstrated by a showing that the purpose or character of the use was commercial. In *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 451 (1984), the Court explained that whether an activity is commercial sets a presumption regarding which way the fourth factor points in a fair use analysis:

> [A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. . . . What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of further harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

HCF's use of the NRA legislator list was noncommercial. HCF, a non-profit organization, made no attempt to sell the list, which in any event contains information

so readily available that it is doubtful it could be profitably sold. HCF used the list only to further its own lobbying goals. It is also difficult to see how the use could harm the NRA's "market." HCF only sent the information to about 200 members, which could not be a particularly damaging distribution. HCF's use of the list, if it did anything, helped *create* a market for the NRA, as citizens on one side of a controversial issue presumably feel more need to engage in political activity if citizens on the other side of the issue are active. This, in fact, is the apparent reason why the NRA sent out its newsletter in the first place, which began: "URGENT! CALL TO ACTION! Anti-gunners in the Ohio General Assembly have launched an all-out attack on your right to keep and bear arms." J.A. at 276. There presumably is more need for the NRA's list if their opponents' activities become more vigorous.

The publication here may be compared with the publication of an original list of information by one of two competing magazines. In such a case, the copying and publication of the list by the competitor would be presumptively unfair and an infringement, for it would reduce the market for the copyright-holding magazine. This contrast with commercial activity helps show that the purpose and character of HCF's use is far removed from that which the copyright law centrally protects and instead falls within the realm of the designated fair use purposes. The document was used primarily in exercising HCF's First Amendment speech rights to comment on public issues and to petition the government regarding legislation. The scope of the fair use doctrine is wider when the use relates to issues of public concern. *Consumers Union of U.S., Inc.* v. *Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983); *cert. denied*, 469 U.S. 823 (1984). Taken as a whole, the HCF newsletter also served an educational purpose, given the considerable information

contained within the mailing regarding guns and gun legislation. Also, there is no evidence of bad faith on the part of the HCF person who compiled the mailing. (*Cf. Fisher* v. *Dees*, 794 F.2d 432, 436-37 (9th Cir. 1986) (no bad faith which could preclude application of the fair use doctrine).

The other factors also support the conclusion that this was a fair use, particularly the second factor, the nature of the copyrighted work. The list in the NRA newsletter is almost entirely factual, and "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U.S. at 563. As HCF amply shows us, lists containing similar facts are readily available. *See* J.A. at 285-329. Regarding the third factor, although HCF used the entire House of Representatives address list, it did not use the remainder of the copyrighted newsletter, which included a Senate list and a letter to NRA members regarding the pending legislation. This letter contained most of the "originality" in the document. For purposes of the second and third factors, one might contrast the list with the HCF's seven pages of detailed analysis of gun legislation, gun types, and related legislation from other states. Mainly in question-and-answer form, those pages provide many facts and opinions in a fairly creative manner. Assuming these pages were copyrighted, if they were photocopied by someone else, their nature and substantiality would weigh on the side of an infringement rather than on a fair use.

III.

For the above reasons, we hold that HCF made fair use of the NRA legislator list under 17 U.S.C. § 107. Because we so hold, we need not reach the HCF's argument that the NRA document contained so little originality that it could not be

copyrighted in the first place.[2] The grant of summary judgment in favor of the defendant is therefore **AFFIRMED**.

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[2]While facts cannot be copyrighted, original compilations of facts may be. The parties dispute whether the NRA's document contained enough originality to be copyrightable under *Feist Publications, Inc.* v. *Rural Tel. Serv. Co.*, 111 S.Ct. 1282 (1991). *Feist* held that a "white pages" phone directory was not original enough to be copyrighted because it was "so mechanical or routine as to require no creativity whatsoever." *Id.* at 1296.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NATIONAL RIFLE ASSOCIATION,

Plaintiff,

v.

THE HANDGUN CONTROL FEDERATION, et al.,

Defendants

CASE NO. 1:90CV0791

HON. GEORGE W. WHITE

MEMORANDUM AND ORDER

This action arises out of the Copyright Act of 1976, 17 U.S.C. § 101, et seq. The plaintiff, National Rifle Association of America (NRA), is engaged in lobbying activities to support the right of law-abiding citizens to keep and bear firearms while the defendant, Handgun Control Federation of Ohio (HCF), engages in lobbying activities to enact laws to restrict possession, ownership and transfer of firearms. In furtherance of its purpose, the NRA disseminates information to its members in the form of magazines, newsletters, pamphlets, media advertisements and other types of publications. In

February, 1988 the plaintiff compiled, organized and arranged information concerning Ohio legislators which was included in a May 5, 1989 five-page newsletter, three pages of which consisted of information concerning members of the Ohio General Assembly, listing each member by name, district, home town and telephone number. Another newsletter was published on June 7, 1989 which contained a refinement of the list of members of the Ohio General Assembly. On July 27, 1989 the NRA applied for and received copyright registration of the newsletters. Plaintiff alleges that the defendants copied the plaintiff's compilation of information concerning the members of the Ohio General Assembly and published it in a newsletter entitled "Lobbying Alert" in violation and infringement of the plaintiff's exclusive copyright rights in their newsletters, and in particular, the lists of the members of the Ohio General Assembly. The parties have filed cross motions for summary judgment.

It is a fundamental rule of law that ideas and facts cannot be copyrighted. *Feist Publications v. Rural Telephone Service, Co. Inc*, 499 U.S. 340, 111 S.Ct. 1282, 1287, 113 L.Ed.2d 358 (1991). But compilations of facts may be protected. 17 U.S.C. § 103. To copyright a compilation the following three criteria must be satisfied: (1) collection and assembly of pre-existing material, facts or data; (2) selection, coordination or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an original work of authorship. *Feist Publications v. Rural Telephone Service Co. Inc.*, 111 S.Ct. at 1293. Originality is most important in determining whether fact based works deserve copyright protection. *Id.* at 1288. The Court must focus on the manner in which the collected facts have been selected, coordinated and arranged to decide whether originality exists. *Id.* at 1294. The Court stated:

> [T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually non-existent.

Id. at 1294. Also the author of the compilation cannot keep others from using the facts that he has gathered. The facts may be freely copied. Copyright protects only the aspects that owe their origins to the compiler, i.e., the selection, coordination and arrangement of the facts. *Id.* at 1295. The facts do not have to be presented in an innovative or surprising way but the selection and arrangement cannot be so mechanical or routine as to require no creativity at all. *Id.* at 1296.

In his declaration attached to the NRA's cross motion for summary judgment, Charles H. Cunningham, states that he put together a newsletter to NRA members concerning pending Ohio gun control legislation. Information concerning Ohio state legislators was accumulated using numerous sources. Specific items and information from these sources were compiled in a format which he devised. He took information included in several existing lists and re-arranged them in ascending numerical order in accordance with their district designations. He also cross-indexed several lists, selecting various information and coordinated and arranged it in an

original manner by juxtaposing horizontally, next to each legislator's name, his or her district number, home city, Columbus phone number and local district phone number. In addition to the list he composed a paragraph of text urging recipients of the newsletter to contact the offices of the representatives, marked with an asterisk and listed in boldface type.

The Court finds that plaintiff's selection and arrangement of the Ohio Representatives to be mechanical and routine. Exhibits before the Court show similar methods of preparing such a list. These exhibits contain a list of committees with names of its members underneath. Plaintiff merely took all the names, placed them in order by district number and put an asterisk by the names of those on the Judicial and Criminal Justice Committees. Defendant Axelrod testified that it is common for lists to indicate the committee handling certain legislation and to specify the members of the committee. Furthermore, there are only a few ways to communicate this type of information in a manner most effective to lobbying organizations. Plaintiff's instructions to contact the persons whose names are marked with an asterisk shows no originality. That type of instruction is contained in most lobbying newsletters urging action by the members of the organization.

Even if plaintiff's material was copyrightable the defense of fair use would bar any recovery of damages. The fair use defense, found in 17 U.S.C. § 107, states:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism,

> comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

The statute further provides criteria for deciding whether the use doctrine applies.

> "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

Plaintiff contends that the first criteria is satisfied in its favor because HCF's use of the list was commercial in that it constituted an unfair exploitation of an original work of authorship and the proprietary rights and privileges that belong to the copyright owner and HCF's competitor, the NRA. The facts in this case show that the list was not used for a commercial motive. HCF is a nonprofit corporation and use of the list did not result in remuneration. NRA's argument that a commercial use was involved because use of the list exploited the NRA's proprietary rights and privileges is without merit. The fair use doctrine allows use without consent because consent would unlikely be given to a class of material that

should be more freely disseminated. Proprietary rights and privileges would block fair use of any material.

In *MCA v. Wilson*, 677 F.2d. 180, 182 (2nd Cir. 1981), the court stated that, as to the nature of the copyrighted work, the court can consider whether it "represented a substantial investment of time and labor made in anticipation of a financial return" as well as whether the work was creative, imaginative and original. There is no indication that the NRA compiled the list for the purposes of a financial return.

The effect of the use upon the potential market for or value of the copyrighted work is another factor to consider. 17 U.S.C. § 107(4). The United States Supreme Court held in *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451, 104 S.Ct. 774, 793, 78 L.Ed.2d 574 (1984),

> [A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. ... What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

There is no doubt that the list was not used for commercial purposes. Therefore the NRA must demonstrate that the use was harmful or that if it became widespread, it would adversely affect the potential market for the copyrighted work. There are no facts proving that HCF's use of the list was harmful. HCF sent the list to less than 200 people. Because of the nature of the list, there is little likelihood that the potential market for the copyrighted work would be effected. HCF received no financial gain from the one time marketing of its newsletter. Also there is no market for this type of list. It is public information published by the state legislature and various groups.

Accordingly, plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

George W. White

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

(3)

No. 93-1926

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NATIONAL RIFLE ASSOCIATION

Petitioner,

vs.

HANDGUN CONTROL FEDERATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit

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25 pp

QUESTIONS PRESENTED

1. Whether Respondents' use of Petitioner's list of the Ohio House of Representatives, organized by district number and listing the Representatives' name, district number, home town, and Columbus and district office phone numbers, constitutes a "fair use" in accordance with 17 U.S.C. §107?

2. Whether Respondents are entitled to a presumption of a "fair use" where the use was not for commercial or profit-making purposes for purposes of analysis under 17 U.S.C. §107(4)?

3. Whether there is a split of authority between the Sixth Circuit and the Second and Fifth Circuits regarding the application of the "fair use" doctrine under 17 U.S.C. §107?

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No. 93-1926

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NATIONAL RIFLE ASSOCIATION

Petitioner,

vs.

HANDGUN CONTROL FEDERATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit

STATEMENT OF THE CASE

Respondents Handgun Control Federation and Susan Axelrod (collectively "HCF") essentially agree with the statement of the case of Petitioner National Rifle Association

("NRA").[1] The facts are not in dispute. The District Court properly decided the case on summary judgment. However, the Court should note that the District Court held that NRA's list was not an original compilation entitled to copyright protection, in addition to finding that HCF's use was a fair use under 17 U.S.C. §107. The Sixth Circuit chose only to address the fair use issue and did not address the issue of the lack of originality of NRA's list of state legislators.

ARGUMENT

I. NRA Misstates And Misinterprets The Application Of The Fair Use Doctrine In Campbell v. Acuff-Rose Music, Inc.

A. The "Fair Use" Doctrine.

Fair use is a privilege in other than the owner of a copyright to use copyrighted material in a reasonable manner

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[1] HCF disagrees with NRA's characterization of its list of the members of the Ohio House of Representatives as being "in a unique format devised by NRA." (Petition, at 3.)

HCF further disagrees with NRA's description of HCF. HCF is a nonprofit organization engaged in educational and lobbying activities concerning legislation regarding gun sales, ownership, and transfer.

without the owner's consent, notwithstanding the monopoly granted to the owner. Rubin v. Boston Magazine Co., 645 F.2d 80, 83 (1st Cir. 1981). The doctrine was designed primarily to balance the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979).

Section 107 of the Copyright Act describes unauthorized and unlicensed uses of copyrighted material that are not infringements of copyright:

> ... the fair use of a copyrighted work, **including such use by reproduction in copies** ..., for purposes such as criticism, comment, ..., teaching, ..., scholarship, or research, **is not an infringement of copyright**. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the

> copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. §107 (1990) (emphasis added).

Where fair use is asserted, the Court should weigh the four factors recited in 17 U.S.C. §107 and apply an "equitable rule of reason" analysis to particular claims of infringement. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451, 104 S.Ct. 774, 78 L.Ed.2d 574, 597-98 (1984). Applying this standard, both the District Court and the Sixth Circuit found that all four fair use factors [§§107(1) through (4)] weighed heavily, if not entirely, in favor of HCF.

NRA does not seriously challenge the Sixth Circuit's fair use analysis under the first three factors listed in 17 U.S.C. §107. As this Court cautioned in Campbell v. Acuff-Rose Music, Inc., 510 U.S. ____, 114 S.Ct. 1164, 1170-71, 127 L.Ed.2d 500, 515 (1994):

> Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

Furthermore, as the Sixth Circuit correctly noted, the weighing in this case must take into consideration the use made of the list by HCF--the exercise of its "First Amendment speech rights to comment on public issues and to petition the government regarding legislation." National Rifle Ass'n v. Handgun Control Federation, 15 F.3d 559, 562 (6th Cir. 1994). "The scope of the fair use is broader when the use relates to issues of public concern." Id.

B. HCF's Noncommercial, Nonprofit Use Of NRA's List Is Entitled To A Presumption Of Fairness.

In its first argument, NRA claims that the Sixth Circuit misapplied this Court's interpretation of the fourth factor of the "fair use" defense set forth in 17 U.S.C. §107 relating to "the effect of the use upon the potential market for or value of the copyrighted work." NRA argues that this Court, in Campbell v. Acuff-Rose Music, Inc., eliminated the presumption of fair use for that factor accorded a noncommercial, nonprofit use by Sony, 464 U.S. at 451, so that the Sixth Circuit's reliance on the presumption in favor of HCF was in error. NRA, however, totally distorts the meaning

of the Campbell decision and its impact on the presumption discussed in Sony.

The Sony case involved the video tape recording of broadcast television programs by home users primarily for the purpose of "time-shifting," or watching programs at a time other than when originally offered for viewing. The owners of copyrights in these programs sued the manufacturers of the home video tape recorders ("VTR") for infringement of the copyrights by the VTR users using the manufacturer's equipment. The Court held that the unauthorized copying of entire copyrighted programs was not an infringement of such copyrights where the use was for time-shifting only and not to otherwise sell or profit from the recording. In so holding, the Court stated that such a noncommercial, nonprofit activity was presumptively a fair use of the copyrighted material:

> If the [VTR] were used to make copies for a commercial or profitmaking purpose, such use would presumptively be unfair. **The contrary presumption is appropriate here**, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a **noncommercial, nonprofit activity**.

464 U.S. at 449 (emphasis added).

Thus, where an unauthorized use of a copyrighted work is for a noncommercial, nonprofit purpose, it presumptively does not have a harmful effect on the potential market for or value of the copyrighted work.

The Sixth Circuit is not alone in having interpreted Sony as providing a presumption in favor of a fair use where the use was for a noncommercial, nonprofit purpose. Lewis Galoob Toys, Inc. v. Nintendo, Inc., 964 F.2d 965, 971, (9th Cir. 1992), cert denied. 113 S.Ct. 1582, 123 L.Ed.2d 149 (1993).

NRA cites the Court's recent Campbell opinion in an attempt to manufacture error on the part of the Sixth Circuit in the instant case. Specifically, NRA quoted the following passage from Campbell:

> No "presumption" or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. Sony's discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of Sony itself (home copying of television programming).

(Petition at 8 quoting Campbell, 1145. S.Ct. at 1177, 127 L.Ed.2d at 523.)

NRA contends that this passage eliminates any presumption in favor of fair use for a noncommercial purpose; there remains only a presumption against fair use where the original is copied in its entirety for commercial purposes. NRA then states that "the instant case does not involve 'mere duplication for commercial purposes,' [because] as the Sixth Circuit itself recognized: 'HCF's use of the NRA legislator list was noncommercial.'" (Petition at 8.) Therefore, under NRA's analysis, no presumption would apply. This is erroneous.

Campbell involved a rap group's parody of the pop song "Oh, Pretty Woman." Parodies, by definition, are unique and distinct from the use at issue in the instant case. When the Court stated that no presumption of market harm based on Sony was applicable to Campbell, it meant that there should not be a presumption of market harm because the market for a parody is generally different from the market for the original work. 114 S.Ct. 1177-78, 127 L.Ed. at 523. In other words, while the parody may be for commercial purposes, it is possible that the market for the parody work (a rap song) would have little or no effect on the market for the original

work (a pop song). Id. However, where the use involves the duplication of the original work, the market for the duplicate work is the same as the market for the original, and therefore the presumptions set forth in Sony apply (i.e. that a commercial use of duplicate work presumptively is unfair to the copyright owner, because of the unlikelihood of affecting the market for the original, and the noncommercial and nonprofit use of a duplicate work is presumptively fair).

Quoting from the remainder of the paragraph from which NRA took the above passage from Campbell, it becomes clear why NRA's analysis is flawed. The paragraph goes on to state that:

> ... [W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects," (citation omitted), of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. (Citation omitted). But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.... (Citation omitted). This is so because the parody and the original usually serve different market functions.

Campbell, 114 S.Ct. at 1177-78, 127 L.Ed.2d at 523.

Thus, Campbell is limited in scope to the analysis of market harm with regard to parodies. The error made by the Sixth Circuit in Campbell, as identified by this Court, was that it failed to recognize the market distinction between a parody and a duplicate work. Such a distinction does not exist in the instant case regarding HCF's use of the list of Ohio General Assembly Representatives.

Since the instant case involves a duplication of the original work, the Sony analysis and presumption in favor of a fair use apply. Accordingly, because HCF's use was a noncommercial, nonprofit use, such use is entitled to a presumption of fairness.

Moreover, because the instant case involves a noncommercial use of the list, the burden is on NRA to rebut the presumption of fairness by proving that HCF's noncommercial use was harmful to the potential market for the list. 17 U.S.C. §107(4). This Court, in Sony, set forth its analysis of the burden of proof as follows:

> ... [A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. **A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.**
>
> * * *
>
> What is necessary is a showing by a preponderance of the evidence that **some** meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. **But if it is for a noncommercial purpose, the likelihood must be demonstrated.**

Sony, 464 U.S. at 451 (emphasis original and added).

A presumption of unfair use does not arise here since the use of the list had no commercial purpose. Therefore, it is NRA who has the burden of demonstrating some meaningful likelihood of harm resulting from the use. NRA has set forth no facts upon which this Court could conclude that the use was, or may be, harmful. Indeed, NRA has previously acknowledged it sustained no monetary loss of any kind. NRA only argues that HCF's use of the list allowed HCF to more effectively counter NRA's lobbying efforts. (Petition at 9 n.

8.) Such a statement totally ignores the inquiry required by the fourth factor -- harm to the potential market for or value of the work.

Regardless of whether or not any presumption applies to the analysis under the fourth fair use factor, HCF's use of the list did not usurp the demand for or adversely effect the value of the list. Both the District Court and Sixth Circuit correctly found that, if anything, the existence of HCF and its publication of materials that directly opposes the position taken by NRA, increases the demand for NRA materials. If no organization publicly opposed NRA's position, there would be little need for NRA to publicly communicate its views via newsletter, or for NRA's lobbying of the Ohio General Assembly.

Further, as both the District Court and Sixth Circuit noted, HCF's distribution of the list was limited to its 200 members. This limited distribution did not adversely effect the demand for the list among the NRA's members or decrease the value of the list to them. The lower courts correctly resolved the fourth factor in favor of HCF.

II. There Is No Split Of Authority Between the Sixth Circuit and the Second and Fifth Circuits Regarding the Application of the "Fair Use" Doctrine Under 17 U.S.C. §107.

A. Respondents Are Not Barred From Invoking The Fair Use Defense.

NRA seeks to manufacture a split of authority between the Second, Fifth, and Sixth Circuit Courts of Appeal concerning the issue of whether a copier of an original work, who fails to credit the original's author, is entitled to invoke the fair use defense. This argument has no basis in the undisputed facts of this case, and should be disregarded.

NRA argues that Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980), and Weissman v. Freeman, 868 F.2d 1313 (2d Cir. 1989), conflict with the Sixth Circuit's opinion in the instant case. Specifically, NRA claims that Triangle and Weissman stand for the proposition that the fair use defense should be available where the defendant fails to credit the author of the original work.

Contrary to NRA's assertion, the decisions of the Second and Fifth Circuits do not establish a per se rule that the

fair use defense is not available where the party evoking the defense fails to credit the author.

In Weissman, the plaintiff was a former research assistant to the defendant, plaintiff's mentor. Plaintiff and defendant co-authored numerous papers focusing on various aspects of nuclear medicine. Thereafter, plaintiff, on his own, prepared an article on a similar topic, and utilized portions of previous papers jointly written by the parties (which the Court considered a copyrightable derivative work). The dispute arose when the defendant used the derivative work prepared by the plaintiff to give a review course in nuclear medicine. The defendant deleted the plaintiff's name from the work, substituted his own name, and slightly changed the title of the article. Id. at 1316.

The Court stated that in examining the equitable considerations, it could not ignore the defendant's attempt to pass off the work as his own, citing the substitution of the author's name and slight change to the title of the work prior to distributing the work as conduct undermining the defendant's right to assert the fair use defense. Id. at 1324.

However, nowhere in the opinion does the Court state that such conduct bars the right to claim the fair use defense.

The Triangle opinion barely mentioned the "passing off" issue, as that case involved no such conduct.

Thus, neither the Second nor the Fifth Circuits set forth a per se rule against claiming the fair use defense where the defendant in a suit for infringement neglects to credit the author of the work. Once again, the Courts look to equities of the situation, and evaluate each case on its own facts.

The facts of this case do not warrant depriving HCF of the fair use defense. NRA filed for copyright protection of the two newsletters on July 27, 1989, **after** it learned of the HCF mailing. NRA did not consider seeking copyright registration for the newsletters prior to seeing the HCF mailing, nor was copyright protection sought for any of its newsletters other than these mailings to its Ohio members. There was no notice of copyright anywhere on the list, nor was there any indication of exclusive ownership of the lists by the NRA. There was nothing on the list stating that the list should not be copied. Respondent Axelrod was unaware that NRA had generated the

list rather than copying it from similar lists available in the public domain.

NRA does not dispute these facts. It simply makes the conclusory statement that "HCF had 'passed off' or 'palmed off' NRA's list as the product as [sic] their own efforts." (Petition at 12.) There is no evidence that HCF attempted to pass the NRA list off as its own. There was no indicia of NRA ownership on the list which could have been deleted, and HCF did not add its name to the list itself prior to mailing its newsletter to its small contingent of members. Accordingly, this case does not involve "passing" or "palming" off.

B. The Sixth Circuit's Analysis Under The Second Fair Use Factor Is Not In Conflict With the Second Circuit.

NRA argues that the Sixth Circuit's opinion finding in favor of HCF concerning the second fair use factor -- the nature of the work -- conflicts with the Second Circuit in Weissman, supra. The Court in Weissman stated, in very general terms, that although a work may be almost entirely factual, and the work may not be directly related to financial gain, copyright protection may be granted to encourage authors

and researchers to continue their efforts and advance the public interest. Id. at 1325.

The work at issue in Weissman was an article involving nuclear medicine education authored by a physician. The Court found that the alleged infringer of the work, considered a copyrightable derivative work based on earlier works co-authored by plaintiff and defendant, could gain professionally (and eventually monetarily) from the distribution of the work in his name, even if he did not realize immediate direct monetary gain. Id. at 1325. The authors of the NRA list could realize no such professional, and eventually monetary, gain.

Success or failure for NRA in the legislative lobbying arena is not based in any way dependent upon copyright protection for a list of the Ohio House of Representatives. As the Sixth Circuit noted, lists containing similar factual information are readily available. 15 F.3d at 562. Thus, the facts in the instant case are not analogous to the facts of Weissman. Accordingly, the decision of the Second Circuit in Weissman is not inconsistent with the approach of the Sixth Circuit in this case whereby the fair use defense is to be

evaluated on a case-by-case basis weighing the four nonexclusive factors set forth in the Copyright Statute. See, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985).

The nature of NRA's "work" is a factual compilation. The constituent elements of the list (name, district number, hometown, and office phone numbers) are all uncopyrightable facts. Since copyright protection for compilations of factual material is at odds with the basic thrust of the copyright laws (Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1370 (5th Cir. 1981)), the scope of permissible fair use is greater than would be possible with respect to "work that is truly creative." Dow Jones & Co. v. Board of Trade of City of Chicago, 546 F.Supp. 120, 131 (S.D.N.Y. 1982); see also Harper & Row, 471 U.S. at 547 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy"); New York Times Co. v. Roxbury Data Interface Inc., 434 F.Supp. 217, 221 (D.N.J. 1977) (where the work is a work more of diligence than of originality or inventiveness, defendants have greater license to use

portions of the work than they would have if a creative work were involved).

Additionally, the scope of the doctrine is undoubtedly wider when the message conveyed relates to matters of high public concern. Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983); see also Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966). The NRA's list was used to facilitate contact between members of the Ohio House of Representatives and their constituents regarding proposed legislation and the public's "right to petition the Government for a redress of grievances." U.S. Const. amend. I. While the First Amendment does not provide a privilege to use copyrighted material distinct from the fair use doctrine, where vital First Amendment concerns are implicated, the breadth of the fair use doctrine expands and accords greater protection to what otherwise might constitute an infringement. Wojnarowicz v. American Family Ass'n, 745 F.Supp. 130, 146-47 (S.D.N.Y. 1990). There is no conflict between the Second and Sixth Circuits concerning the interpretation and analysis of the second fair use factor.

CONCLUSION

For the foregoing reasons, Respondents HCF and Susan Axelrod urge the Court to deny NRA's petition for writ of certiorari.

Respectfully submitted,

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